EDITOR'S NOTE

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE

UNITED STATES

WILLIE JASPER DARDEN,

Petitioner,

v.

LOUIE L. WAINWRIGHT,

Respondent.

85-5319

CASE NO. 85-5139

PETITIONER'S RESPONSE TO EXTRAORDINARY
MOTION TO DISSOLVE STAY OF
EXECUTION AND SUGGESTION THAT
WRIT WAS IMPROVIDENTLY GRANTED

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I. INTRODUCTION

On September 3, 1985, the Court granted Mr. Darden's petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. Respondent has now alleged that this Court's decision to allow full briefing and a studied resolution of the issues presented in the certiorari petition, was "wrought in oversight of established legal standards,"[1] and claims that "[a] rule of five should prevail over a rule of four." See Extraordinary Motion to Dissolve Stay of Execution and Suggestion that Writ was Improvidently Granted, pp. 2 and 9 (hereinafter "Extraordinary Motion."). Additionally, according to Respondent, the Court was "mislead" and provided with "false information,"[2] and consequently crumbled under "the pressure created by Petitioner's last minute effort" to seek review of his first habeas petition.[3] (Extraordinary Motion, p. 2, 6, and 7).

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[1] As is discussed below, the Court in fact followed time-honored and tested legal standards in its action. Contrary to the State of Florida's derogatory characterization, the Court acted prudently in response to a crisis situation precipitated by the advice of the Department of Legal Affairs, State of Florida, to the Governor to sign Petitioner's death warrant while a stay of execution ordered by the Eleventh Circuit was in effect.

[2] Petitioner was described as having predicated an entire claim "on absolutely false information." (Extraordinary Motion, p.6). Respondent thus seems to be accusing counsel of flat-out lying to obtain a stay. Id. Such shocking (and meritless) accusations, while perhaps reflecting only "sour grapes," are more likely an attempt to incite uncritical wrath from the Court, and thereby to deflect and short-circuit the Court's merit appraisal of the issues. The State's indecorous comments are briefly rebutted at fn. 10, infra. The State's intemperance was also measured by the district judge. Respondent earlier accused the magistrate of fabricating the Witherspoon issue.

[3] Any pressure was created by Respondent. Petitioner created no pressure. The Eleventh Circuit denied rehearing in this first habeas petition August 27, 1985. The State, after the Eleventh Circuit decision denying relief on July 23, 1985, but before Petitioner's filing for and the court's denial of rehearing, set Petitioner's execution for September 4, 1985. A petition for writ of certiorari was not (and is not) due in this Court until approximately November 25, 1985. Thus, due only to Respondent's ill-timed attempt to execute Petitioner and thereby to deprive Petitioner of his right to seek certiorari review of the Eleventh Circuit's decision in his case, an emergency petition had to be filed in this Court almost three months before it was due. Respondent has quite simply condemned Petitioner for reacting to the State's itchy trigger finger.

Ironically, in its effort to condemn Petitioner and this Court, Respondent has misconstrued the law relating to provident grants of certiorari, and has misrepresented the history and record in this case. It is as if the State now wishes to accomplish in an angry voice what it was unable to achieve when it spoke in tones of reason.

Since the State is now without the benefit of its haste-producing death warrant power, the allegations raised in its Extraordinary Motion can be carefully dissected and properly dismissed. Petitioner will show that the procedures employed by the Court in granting certiorari were proper and anything but "unusual", "unique", or "unprecendented" [sic]. (Extraordinary Motion, pp.1, 8). Petitioner will also demonstrate, without arguing the merits, that the issues upon which certiorari was granted are truly worthy of plenary consideration.

II. THE COURT CORRECTLY FOLLOWED THE "RULE OF FOUR."

Respondent asserts that the Court should not have granted certiorari because this is a case which "five justices have already determined has no chance of ultimate success. . . . A rule of five should prevail over a rule of four." (Extraordinary Motion, p.9). In addition, the State argues that even if certiorari were appropriate, a stay of execution should not have been granted when five justices did not believe merit review would result in reversal. Id. Both of these propositions stem from a fundamental misunderstanding of the purposes and processes of certiorari review. Respondent has confused the proper standards for a stay by a single Justice, acting as Circuit Judge, with the proper action when the full Court acts upon a request for stay, after four members have voted for certiorari review.

In the first three pages of Respondent's Extraordinary Motion, a catalog of single Justice (Circuit Justice) opinions and orders on stay requests is presented. Respondent correctly points out (in non-capital cases) the test which must be met

before a single Justice should issue a stay of a lower court's judgment pending certiorari or appeal to the Court:

> The first [step] was determining whether the so-called 'rule of four' would be satisfied, and the second was prognosticating whether there was a "fair prospect that a majority of the Court would conclude the decision below was erroneous."

[Extraordinary Motion, p.2 (citations ommitted)]. Respondent concludes that if five Justices would not be likely to reverse, a stay should not be entered.

By contrast, in this case "four justices have voted to grant certiorari. . . ." Darden v. Wainwright, No. 85-5319 (A-181), slip opinion at 1 (September 3, 1985) (Powell, J., dissenting). This was not a single-justice decision. The difference is crucial, and what makes it crucial is the rule of four.

The misrepresentation in Respondent's argument is that it is posited that the seven single-Justice chambers decisions cited provide, and according to Respondent have always provided, the framework for analysis when the whole Court acts or has acted. Respondent's subsequent analysis of the certiorari and stay issues, under a five-Justice set-up, is tainted and unpersuasive.

The jurisprudential differences between single-Justice stays pending certiorari, and grants of certiorari under the rule of four, underscore why the State's position is so wrong. When a single Justice acts on stay requests, he or she acts in a trustee status. As expressed by Justice Marshall, in a decision relied upon by Respondent, special deference to the views of the entire Court is proper when a single Justice acts:

> [T]he Supreme Court is a collegial institution, and its decisions reflect the views of a majority of the sitting Justices. It follows that when I sit as a Circuit Justice, I act not for myself alone, but as a surrogate for the entire Court, from whence my ultimate authority in these matters derives.

Holtzman v. Schlesinger, 414 U.S. 1304, 1313 (1973) (Marshall, J., Circuit Justice). It is from this relationship that the so-called rule of five arises. A Justice must attempt to act

as the Court would act. See Heckler v. Blankenship, ___ U.S. ___, 104 S.Ct. 966 (1984) at 967 (O'Connor, J.), citing Gregory-Portland Independent School District v. United States, 448 U.S. 1342, 101 S.Ct. 20, 65 L.Ed.2d 1164 (1980) (Rehnquist, J., on resubmission); Spinkelink v. Wainwright, 442 U.S. 1301 (1979) (Rehnquist, J.).

Because there was no Circuit Justice action herein, respondent's entire argument misses the mark. The Court acted, certiorari was granted, and a stay of execution necessarily followed to preserve this Court's jurisdiction over the action and to prevent Respondent from mooting the certiorari issues by executing Petitioner.

Stripped of its misinterpretation of the single Circuit Justice opinions, see Schlesinger v. Holtzman, 414 U.S. 323 (1973), Respondent's argument is simply that the rule of four is a bad rule, largely because it kept the State of Florida from executing Petitioner due to "last minute activity." It is incongrous to fault the Court for adhering to the foundational recognition that when four members of the Court wish to grant certiorari review, the Court hears the case. Whether the Court adheres to its time-honored and tested operating procedures despite, or because of, the crisis created by Respondent, the Court should be commended rather than condemned, and should reject Respondent's attack, rather than retreat as requested. Since it is Respondent's apparent desire to bully the Court out of the rule-of-four in death penalty cases, an affirmation of the purpose of the rule is in order.

When the Court's discretionary certiorari jurisdiction was expanded in 1925, Congress was promised that the increase in discretionary review did not foreshadow the end of full court review. Harris v. Pennsylvania Road Co., 361 U.S. 15, 18n. 2 & 3 (1959). To assure Congress that the Court did and would protect against "a possible abuse of its own discretion," see Mr. Justice Burton, Justice is Also Administration, 33 A.B.A.J. 1,

1099, 1164 (1947), and a consequent heavy curtailment of full review of cases, the Court explained to Congress that a minority of the Court was all that was needed for a case to receive plenary consideration:

> We do not grant or deny these petitions merely according to a majority vote. We always grant the petition when as many as four think that it should be granted and sometimes when as many as three think that way. We proceed upon the theory that, if that number out of nine are impressed with the thought that the case is one that ought to be heard and decided by us, the petition should be granted.

Harris, 316 U.S. at 18n. 3 (quoting H.R. Rep. No. 1075, 68th Cong., 2d Sess., p. 3, testimony of Justice Van Devanter). See also Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500 (1957) (Harlan, J., concurring in part and dissenting in part). This "promise to Congress," Harris, 316 U.S. at 18 (Douglas, J., concurring) made the placement of vast discretion in the Court to hear or reject cases "tolerable." Id.

The rule of four is, however, much more than a contract with Congress; it stands alone on a sound jurisprudential footing, and Congress was merely informed of the practice, not the philosophy. As Justice Marshall stated in Holtzman v. Schlesinger, supra, this Court is "a collegial institution," and it is charged with directing, as in this case, the resolution of dramatically important, and controversial, issues of constitutional stature over which reasonable jurists, as well as the public at large, differ. Without a controversy, a case would not make it here. This Court, through its rule-of-four, has guaranteed that the "minority view," Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 529 (1957) (Frankfurter, J., dissenting), will frequently control the Court's docket, by way of a highly reasonable and practical presumption: "if four Justices find that a legal question of general importance is raised, that is ample proof that the question has such importance." Id. See also Blumstein, J., The Supreme Court's Jurisdiction -- Reform Proposals, Discretionary Review, and Writ Dismissals, 26 Vand. L. R. 895, 920 (1973) ("the

rule of four seems implicitly related to minority control of the docket").

Respondent wants majority rule of this Court's docket, as well as majority rule in this Court's opinions. Respondent's reasoning is that "[f]ive members of the Court are of the belief that none of the claims contained in the petition for certiorari is possessed of any merit," and "resolution of the issues appears headed towards a foregone conclusion." (Extraordinary Motion, pp. 1 and 9). Accepting, without conceding, the truth of these assertions, Petitioner notes that certiorari was granted because only five Justices were opposed to it, and Respondent's topsy-turvy logic is that now the Court should dismiss the certiorari grant for the very same reason. Since four members of this Court favor certiorari, Petitioner can now proceed, through full briefing and argument, to alter that "foregone conclusion" touted by Respondent. Respondent's complaint is nothing more than a description of the rule-of-four, and the rationale for change is that Respondent lost the vote.

The remedy urged by Respondent is specious: whenever the rule-of-four works as it was planned, the majority of the Court can simply enter an order dismissing the grant of certiorari. This procedural veto is not the purpose of a dismissal of the writ as having been improvidently granted[4], and it is only the integrity of this Court that forestalls such coy tactics. As a matter of policy, the Court does not use majority rule to

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[4] A grant of the writ of certiorari is dismissed as having been improvidently granted only when some important consideration has changed since the granting of certiorari:

> After certoriari has been granted, it may become apparent to the Court upon oral argument and upon further study that the basis upon which review was permitted is in fact nonexistent. "Examination of a case on the merits, on oral argument, may bring into 'proper focus' a consideration which, though present in the record at the time of granting
> (Footnote Continued)

summarily defeat the rule-of-four. See Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 559 (1957) (Harlan, J., concurring in part and dissenting in part) ("I think the Court should not have taken any of these cases. Nevertheless, the cases having been taken, I have conceived it to be my duty to consider them on the merits, because I cannot reconcile voting to dismiss the writs as 'improvidently granted' with the Court's 'rule-of-four.'"); Sentilles v. Inter-Caribbean Shipping Corp., 316 U.S. 107, 111 (1959) (Stewart, J., concurring) ("Cases like this, I am convinced, do not belong in this Court. . . . Yet under our rule, when four members of the Court vote to grant a petition for certiorari, the case is taken. If this rule is not to be frustrated, I can . . . see no escape from the duty of considering a case brought here on the merits."); New York v. Uplinger, 104 S.Ct. 2332, 2334 (1984) (Stevens, J., concurring) ("As long as we adhere to the Rule of Four, four Justices have the power to require that a case be briefed, argued, and considered at a post-argument conference.").

This very policy was applied in Donnelly v. De Christoforo, 416 U.S. 637 (1974), and provided Respondent with the majority

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(Footnote Continued)

> the writ, only later indicates that the grant was improvident." The Monrosa v. Carbon Black, Inc., 359 U.S. 180, 184. As stated by Mr. Justice Frankfurter in Armstrong v. Armstrong, 350 U.S. 568, 572, "[a]fter a case has been heard on the merits, it is to be disposed of on the precise issue that full study of the case discloses, and not on the basis of the preliminary examination of the questions that were urged in the petition for certiorari." Belcher v. Stengel, 429 U.S. 118. Or a change in circumstances since the writ was granted may have lessened the importance of the case. Thus in Quinn v. Muscare, 425 U.S. 560, the writ was dismissed because the principal question raised had been determined by the Court in another case, and the procedural objection had as a practical matter been remedied for the future by a change in the administrative regulation.

R. Stern & E. Gressman, Supreme Court Practice 369-370 (5th ed. 1978).

opinion which is now claimed to be controlling with regard to Petitioner's prosecution closing argument issue. There was a six Justice majority in Donnelly, but two of the six wrote separately to explain why they joined the Court's opinion:

> I think it was a mistake to grant a writ of certiorari in this case, and I would now dismiss the writ as improvidently granted.
>
> We are bound here, however, by the "rule of four." That rule ordains that the votes of four Justices are enough to grant certiorari and bring a case before the Court for decision on the merits. If as many as four Justices remain so minded after oral argument, due adherence to that rule requires me to address the merits of a case, however strongly I may feel that it does not belong in this Court.

416 U.S. at 648 (Stewart & White, J.J., concurring).

And so it is here, yet Respondent urges the majority to overpower the rule-of-four, even before briefing and argument. If the rule-of-four is strong enough to require adherence upon merits review, summary dismissal is especially improper. Cf. Pennsylvania v. Mimms, 434 U.S. 106, 124 (1977) (Stevens, J., dissenting) ("[T]his kind of [summary] disposition gives rise to an unacceptable risk of error and creates 'the unfortunate impression that the Court is more interested in upholding the power of the State than in vindicating individual rights.'") (citations omitted); Leis v. Flynt, 439 U.S. 438 (1979) (Stevens, J., dissenting).

Respondent is wrong. The Court's action in granting certiorari, and a stay to preserve it, was not "wrought in oversight of established legal standards."[5] (Extraordinary Motion, p. 2). The principles relied upon by Respondent may be sound when a Circuit Justice acts, but have no application here.

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[5] Respondent was more complimentary (but still inaccurate) in its descriptions of this Court's actions in Darden contained in their Motion to Vacate Stay of Execution in Florida v. Booker, ___ U.S. ___ (1985). In their pleading, the State noted that "in Darden ___ U.S. ___, No. 85-5319 (U.S. Sept. 5, 1985), a sharply divided Court created a plausible likelihood that four Justices would vote to grant certiorari or even reverse."

A rule-of-five has no place in this Court's certiorari jurisprudence, and Respondent's request for it in cases set for execution suggests a heartiness for majority control that is truly unsettling.

III. THE ISSUES UPON WHICH CERTIORARI WAS GRANTED ARE WORTHY OF THIS COURT'S CONSIDERATION

Petitioner has twice before petitioned this Court for a writ of certiorari. That fact should have absolutely no bearing upon whether the issues, as presently presented, merit review.

The first petition for certiorari was granted from direct appeal of the Florida Supreme Court's decision; this petition was later dismissed. A denial of certiorari from this Court on a federal claim raised in a state proceeding has no legal effect or precedential value on the merits. Brown v. Allen, 344 U.S. 443, 488-95 (1953) (Frankfurter, J., for a majority of the Court).[6] Thus, this Court has frequently granted habeas corpus relief on federal claims that were raised earlier in certiorari petitions denied by this Court. See, e.g., Shephard v. Maxwell, 384 U.S. 333 (1966); Townsend v. Sain, 372 U.S. 293 (1963); Irwin v. Dodd, 366 U.S. 717 (1961); Rogers v. Richmond, 365 U.S. 534 (1961); Leyra v. Denno, 347 U.S. 556 (1954); Moore v. Dempsey, 261 U.S. 86 (1923); see also Knapp v. Arizona, 435 U.S. 908 (1978) (Blackmun, J., concurring).

The second petition for a writ of certiorari denied by this Court was in fact a conditional cross-petition for writ of

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[6] An order dismissing the writ as having been improvidently granted is not a decision on the merits, and has no more precedential value than a simple denial of certiorari. Darden v. Wainwright, 513 F.Supp. 947, 950 (M.D.Fla. 1981). Hughes Tool Co. v. Trans World Airlines, Inc., 407 UU.S. 363 (1973). A dismissal means only "that conditions originally thought to justify granting the writ of certiorari are not in fact present," Burrell v. McCray, 426 U.S. 471, 473-74 (Brennan, J., dissenting), so the writ should not have been granted ab initio. Thus, the first grant of certiorari in this case has no precedential force.

certiorari.[7] Its denial has no precedential value, and it is Petitioner's contention that this Court's consideration of that petition was muted by the decision to grant the State's petition for writ of certiorari and summarily vacate the case. Petitioner was granted relief by the en banc Eleventh Circuit Court of Appeals, and the State sought certiorari review. Petitioner sought review "if and only if Wainwright's petition in No. 83-1613 is granted." It was Petitioner's clear-cut explicit intent to request full hearing upon the issues he had lost only if this Court provided a full hearing to the State on the Witherspoon issue he had won. In short, Petitioner requested certiorari review only if there was plenary consideration of the State's request -- he had no other reason to seek certiorari; he had won.

No plenary consideration occurred. The State's petition was granted, but the case was vacated for further consideration in light of Wainwright v. Witt, ___ U.S. ___ , 105 S.Ct. 844 (1984). Once the Court vacated the case, there was no need to fully consider Petitioner's cross petition for certiorari; the condition precedent for such review did not occur. The proper time for full review is now. The Court's prior action on the conditional cross certiorari request in no way undermines Petitioner's contention that review is now proper. A conditional cross-petition filed out of an abundance of caution is nothing short of a nullity when this Court summarily remands the entire case to the lower court.[8]

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[7] "[A] party may not desire the Court independently to review the portions of the judgment which are unfavorable to him, but may believe that review should encompass the whole case if his opponent's petition for certiorari is granted. Such a party may appropriately file a conditional cross-petition which he will ask to have granted only if the opposing petition is granted." R. Stern & E. Gressman, Supreme Court Practice 477-78 (5th Ed. 1978) (footnote omitted).

[8] Petitioner has no way of knowing for sure why his conditional petition for certiorari was denied. In light of the Court's action on the State's petition, however, an educated guess is (Footnote Continued)

The issue now is whether the following issues are worthy of this Court's consideration upon full briefing and argument. Petitioner will briefly outline the facts and the issues, and will generally address the question of why this Court should address and resolve the claims in plenary fashion.

A. THE PROSECUTOR'S CLOSING ARGUMENT CREATED AN UNACCEPTABLE RISK THAT THE DEATH PENALTY IN THIS CASE WAS METED OUT ARBITRARILY

Petitioner's guilt of first-degree murder was a close jury question: The sole evidence of guilt was cross racial identifications.[9] The prosecutor's closing arguments came immediately after Petitioner had, in the words of the trial judge, "emotionally, and with what appeared on its face to be sincerity, proclaimed his innocence" before the jury.[10]

(Footnote Continued)
possible. The Court granted the State's petition for writ of certiorari in Wainwright v. Witt, 104 S.Ct. 2168 (1984) on April 30, 1984. Witt involved a Witherspoon issue similar to the one upon which the en banc Eleventh Circuit granted relief to Mr. Darden. The State's petition for certiorari in this case was filed after certiorari had been granted in Witt. This Court ultimately reversed the Eleventh Circuit decision in Witt, granted the State's petition for writ of certiorari in Darden, and vacated in light of Witt. It is not unreasonable to assume that at the time Mr. Darden filed his conditional cross-petition, this Court was aware that the course of litigation herein would be controlled by Witt, and consequently denied the conditional cross-petition summarily.

9 "The case against Darden was not a weak case, but it did depend on the jury's determination of the credibility of Darden's alibi testimony as against the eyewitness testimony of the victims. All attacks upon Darden which would affect his credibility in the minds of the jurors or prejudice them against him would tend to discredit him and his testimony." Darden v. Wainwright, No. 79-566 Civ.T-H, opinion at 22 (M.D. Fla. April 10, 1981) (Magistrate's Report and Recommendation), recommendation that writ issue based on prosecutorial misconduct rejected by district court, Darden v. Wainwright, 513 F.Supp. 947 (M.D. Fla. 1981).

10 Petitioner has extensively outlined in his Petition for Writ of Certiorari the tenuous foundation upon which the guilt verdict rests, which leaves the innocence question open. Petition, pp. 16-21. Innocence is a troubling issue in the case. For instance, the eyewitnesses were engaged in incredibly suggestive identification procedures by the State. The victim's widow identified Mr. Darden when he was the only black in a small courtroom, after the prosecutor walked over to Petitioner, (Footnote Continued)

Respondent does not and cannot deny that it was in these guilt/innocence arguments that the State demanded the death penalty. See Darden v. Wainwright, 513 F.Supp. 947, 953 (M.D. Fla. 1981) ("[At guilt/innocence] he was also making in effect, his principal argument in support of the death penalty."); Darden v. Wainwright, ___ F.2d ___, No. 81-5390, at 1n.2 (11th Cir. August 27, 1985) (Clark, J., dissenting from denial of petition for rehearing) ("[T]he prosecution made its sentencing argument at the guilt/innocence phase."). After closing argument and conviction, no further evidence was presented, although Petitioner did make a brief closing statement to the jury. The prosecutor's guilt/innocence closing arguments did not dissipate before the jury considered sentencing.

There is no argument about whether the closing arguments

(Footnote Continued)
pointed at him, and said "Is that the man that did it?" Id. at 17. She had earlier told police "she could not remember what the suspect looked like or what he was wearing." Id. She identified Petitioner at trial as her assailant. The other eyewitness was shown six photographs while he was in the hospital, and he understood that the pictures were shown to him "to identify the person that shot me. . . ." He chose two pictures that "look[ed] a little like him," and finally selected one picture: the only one with a name on a white tag -- Darden. Id. at 18. Petitioner urges the Court to review the skimpy evidence upon which guilt is predicated. Id. at 16-21.

Into this dearth of evidence stepped the racial issue. The jury was specifically asked whether they could "try Mr. Darden as if he was white." Id. at 16. The closing argument substituted vitriolic rhetoric for evidence, leading the magistrate below to conclude:

> In the context of the emotionally charged trial of Darden, a black man, accused of robbery, the brutal murder of a white man, the repeated shooting of a defenseless white teenager and vile sexual advances on a white woman, I have more than grave doubts that the improper, repeated, prejudicial argument of the prosecution did not affect the jury in its deliberation. I am convinced that the jury deliberation was substantially influenced by the improper argument and that the jury was prejudiced against Darden by the argument. The state has failed to demonstrate, beyond a reasonable doubt, that the prosecutor's comments did not contribute to Darden's convictions.

were egregiously improper: every court which has examined the arguments has condemned them as fundamentally and outrageously improper.[11] The only issues are whether the arguments were prejudicial and what prejudice test applies and. The prejudice test, and its application, warrant certiorari review.

While Respondent is correct that the prosecutorial misconduct argument has been rejected by the courts, the rejection has not been as wholehearted as suggested. Extraordinary Motion, pp. 3-4. Two Justices of the Florida Supreme Court would have reversed the conviction, without even examining the effect on sentencing. Darden v. Wainwright, 329 So.2d 287, 291 (Fla. 1976) (Sundberg & England, J.J., dissenting). The magistrate below similarly recommended reversal of the conviction, Darden v. Wainwright, No. 79-566 Civ. T.H. (April 10, 1981) (Magistrate's Report and Recommendation), as did a dissenter from the panel opinion of the Eleventh Circuit. Darden v. Wainwright, 699 F.2d 1031, 1040 (11th Cir. 1983) (Clark, J., dissenting). The en banc Eleventh Circuit decisions did not critically analyze the panel decision on closing

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[11] The state has wisely yielded: "No one has ever really suggested that McDaniel's closing remarks were anything but improper. . . ." Respondent's Supplemental Answer, p. 12, quoted in Magistrate's Report and Recommendation. The district court characterized the argument as a "tirade" containing "blatant expression of a personal opinion" and "a series of utterly tasteless and repulsive remarks" 513 F.Supp. at 953, 955:

> Anyone attempting a text book illustration of a violation of the Code of Professional responsibility, Canon 7, EC 7-24 and DR 7-106(C)(4) could not possibly improve upon [the prosecutor's] example.

513 F.Supp. at 955. The majority panel decision in 1983, which is the en banc court's opinion, similarly condemned the arguments "as tasteless and unprofessional," which "contained personal opinions," and "would have been reversible error on appeal from a federal criminal case." 699 F.2d 1031, 1035-36. Like the district court, however, the majority opinion concluded (without discussing the Eighth Amendment) that the arguments were harmless. Even the majority opinion in the Florida Supreme Court recognized that "the prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility. . . ." 329 So.2d at 290.

argument, but merely adopted it, because the Witherspoon issue took control of the case and its litigation. Consequently, every court that has given studied attention to the closing argument issue has split on the question of prejudice.

The problem is Donnelly v. DeChristoforo, 416 U.S. 637 (1974). As noted, a string of judges in the case sub judice have come to different conclusions applying the Donnelly test, which is a clear demonstration of the case's unsuitablity for fragile death penalty analysis, where reliability is the key. Petitioner believes that this case provides an appropriate vehicle for an analysis of Donnelly and its application in a capital case setting. As will be shown, Donnelly has proven ineffective in other cases as well as in protecting defendants from flagrantly abusive and unethical closing arguments, and the proper parameters of the Donnelly prejudice test is a source of confusion in the federal circuit courts.

1. Reliability in Sentencing -- The Central Eighth Amendment Theme

Reliability is and must be the cornerstone of capital sentencing. This Court's capital sentencing decisions have centered around the imperative of minimizing the risk of arbitrary decisionmaking. Ake v. Oklahoma, ___ U.S. ___, 105 S.Ct. 1087 (1985); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 874-76 (1982), id., 102 S.Ct. at 878 (O'Connor, J., concurring); Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980); Lockett v. Ohio, 438 U.S. 586, 605 (1978). Because death is different from any other punishment, the procedures by which the decision to impose death is made require constitutional limitations not required in other sentencing decisions, see Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368 (1982); Gardner v. Florida, 430 U.S. 349 (1977), and procedures which might otherwise be constitutional at guilt/innocence proceedings fall short of the constitutional mark when death may attach to a conviction. Beck v. Alabama, 447 U.S. 625 (1980). Above all, a death sentence cannot survive if the sentence is "imposed out of

whim, passion, prejudice, or mistake." Eddings v. Oklahoma, 102 S.Ct. at 878 (O'Connor, J., concurring).

2. Donnelly is Incompatible With Eighth Amendment Jurisprudence, and is Inconsistently Applied by the Circuit Courts in Habeas Corpus

In Donnelly, this Court adopted what the lower courts have termed a very restrictive test for review of prosecutors' closing arguments under 28 U.S.C. Section 2254. The argument must make the "trial so fundamentally unfair as to deny [petitioner] due process." 416 U.S. at 645. The Donnelly facts are not particularly egregious, and the result is not a surprising or unfair one. The prosecutor had made an ambiguous isolated remark which, through speculation, may have conveyed a false impression that petitioner offered to plea guilty to a lesser charge. The trial court "took special pains to correct any impression that the jury could consider the prosecutor's statements as evidence in the case," and admonished the jury to disregard the comment. Id. at 644. This Court held that under these facts, due process had not been violated.

Federal courts have interpreted Donnelly as a virtual bar to federal habeas relief in a Section 2254 proceeding, an interpretation which, if in fact at odds with Donnelly, should be corrected by the Court. Rule 17.1 (c), Supreme Court Rules. "Indeed, it is notable how often the courts cite improper argument by a prosecutor and how seldom they reverse convictions because of it." United States v. Bess, 593 F.2d 749, 757 (6th Cir. 1979).

The lower courts' interpretations of the specific Donnelly prejudice test varies, but one point is unanimously underlined: the test is "the narrow one of due process." O'Bryan v. Estelle, 714 F.2d 365, 387 (5th Cir. 1983) (emphasis added) (quoting Donnelly, 416 U.S. at 642). Thus, an argument may be "regrettable and should not be repeated," but not be a "crucial, critical, highly significant factor upon which the jury based its verdict of guilty," and so not be a violation of due process.

Whittington v. Estelle, 704 F.2d 1418, 1425 (5th Cir. 1983). Since the Donnelly inquiry "is generally a narrow one," when evidence of guilt is great, "any prosecutorial misconduct cannot be said to have caused the guilty verdict and was harmless beyond a reasonable doubt." Phelps v. Duckworth, 757 F.2d 811, 827 (7th Cir. 1985). Comments which are "consistently disapproved" of pass muster under Donnelly. Soap v. Carter, 632 F.2d 872, 877 (10th Cir. 1980).

The seventh circuit believes Donnelly means that the improper comments must have been "so egregious" that they "changed the result" of trial before due process is violated. United States ex rel Shaw v. DeRobertis, 755 F.2d 1279, 1281, 1282 (7th Cir. 1985). Some decisions even suggest that some super due process violation must occur before any protection is forthcoming under Donnelly:

> Donnelly teaches that in a Section 2254 proceeding more than undesireability or even "universal condemnation" [of an argument] must be shown. . . . [I]t must be shown that the remarks were so prejudicial that they rendered the trial in question fundamentally unfair. 416 U.S. at 643, 94 S.Ct. 1868. Here the claim is simply that the prosecutor's remarks so infected the trial with unfairness as to make the conviction a denial of due process.

Cobb v. Wainwright, 609 F.2d 754, 755-56 (5th Cir. 1980).

Leaving the death penalty question aside for the moment, it is plain that the courts believe Donnelly is a case espousing restriction of the habeas remedy, an interpretation at odds with the facts and result in the case itself: a single relatively innocuous and certainly ambiguous comment was corrected by the trial court in Donnelly and thus did not amount to a denial of due process. This is no wholesale validation and unleashing of improper prosecutor arguments, and this Court should clarify the confusion which has resulted.

More importantly, the application of the Donnelly test in a death penalty setting, at least as Donnelly has been interpreted by the lower courts, is completely unworkable. An outcome

determinative test is simply too big a burden for petitioners to meet, and relief is too restrictive to ensure that closing arguments do not produce death sentences based upon whim, passion, prejudice, or mistake. See Eddings, supra.

The truth of this proposition is demonstrated by the case sub judice. The lower court majority used Donnelly, and denied relief, without once mentioning the death penalty and how the closing argument could have affected that sentence. No Eighth Amendment gloss was placed on the analysis; the penalty was not mentioned, only the conviction. This is quite simply unworkable.

3. Either Caldwell v. Mississippi Provides the Necessary Eighth Amendment Gloss to Donnelly, and Petitioner is Now Entitled to Application of the Caldwell Test, or This Court Should Now Conform Donnelly to Eighth Amendment Standards

Petitioner believes he is entitled to relief even under Donnelly, as have four previous judges in this case. Petition for Writ of Certiorari at 28-30. However, Petitioner also believes that Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), was intended by this Court to provide guidance to lower courts in their treatment of prosecutor closing argument claims in capital cases. If Caldwell was so intended, Caldwell should now be applied to Petitioner's case. Rule 17.1 (c).

In Caldwell, the prosecutor (and judge) had informed the jury that their decision on death was subject to appellate review: "your decision is not the final decision . . . [y]our job is reviewable." 105 S.Ct. at 2646 (O'Connor, J., concurring). In fact, the jurors' decision in Mississippi is presumed correct on appeal, and is thus not subject to ab initio review.

Caldwell argued that "[t]he remarks at issue here divert the jury from focusing on the constitutionally mandated factors relating to the nature of the crime and the background and characteristics of the individual offender." See Brief of Petitioner at 27, Caldwell v. Mississippi, 105 S.Ct. 2633 (1985). He specifically directed the Court to Eighth, not Fourteenth, Amendment law to resolve the issue:

> [W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.
>
> Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2990-2991 (1976) (plurality opinion).
>
> See also Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 2744 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-112, 102 S.Ct. 869, 974 (1982); Lockett v. Ohio, 438 U.S. 586, 601-605, 98 S.Ct. 2954, 2963-2965 (1978) (plurality opinion); Roberts (Harry) v. Louisiana, 431 U.S. 633, 636-637, 97 S.Ct. 1993, 1995 (1977); Gregg v. Georgia, supra, 428 U.S. 153, 197, 96 S.Ct. 2909, 2966 (plurality opinion); Proffittt v. Florida, 428 U.S. 242, 251-252, 96 S.Ct. 2966 (1976) (plurality opinion).
>
> The remarks by the prosecutor diverted the jury from meting out the "unique, individualized judgment regarding the punishment that a particular person deserves," Zant v. Stephens, supra, U.S. ___, 103 S.Ct. at 2755 (concurring opinion, Rehnquist, J.). The sentence should be reversed.

Id. at 28.

Respondent, State of Mississippi, directed the Court to "fundamental fairness" due process considerations and argued that review in this Court was restricted to alleged error which "so infected the trial with unfairness so as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637 (1974). See Brief of Respondent at 23-24. Respondent in Caldwell cautioned this Court that "not every trial error or infirmity which might on direct appeal of a federal conviction call for an application of a federal appellate court's . . . supervisory powers correspondingly constitutes the denial of due process." Id. at 25.

This Court responded to Donnelly, and embraced Caldwell's Eighth Amendment argument. In so doing, the Court placed a reliability gloss on the restrictive Donnelly rule in capital cases. The Court first underscored that Donnelly "does not

insulate all prosecutorial comments from federal constitutional objections." 105 S.Ct. at 2644. After distinguishing the Donnelly facts, this Court held that "[b]ecause we cannot say that his [argument] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id. at 2646.

Thus, under Caldwell, certainly some types of improper prosecutorial comments render a sentencing proceeding fundamentally unfair (per Donnelly) when the comments cannot be said to have had no effect on the delicate and individualized sentencing process.

The Court should specify what types of closing arguments fall under Caldwell. Certainly the argument here is included. The Eleventh Circuit is in turmoil over whether its en banc decisions in Tucker (William) v. Kemp, 762 F.2d 1496 (11th Cir. 1985), Tucker (Richard) v. Kemp, 762 F.2d 1480 (11th Cir. 1985), Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) and Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985), comport with the requirements of Caldwell. The Brooks line of cases barely predates Caldwell, and this Court will ultimately receive timely petitions from petitioners in those cases.

The substantive conflict between Caldwell and Brooks is readily apparent: Caldwell requires resentencing after improper prosecutorial argument, unless the state demonstrates that the argument "had no effect on the sentencing decision," 105 S.Ct. 2646; Brooks requires resentencing after improper prosecutorial argument only if there is "a reasonable probability that, but for those arguments, the death penalty would not have been given." 762 F.2d at 1413. The Brooks[12] adoption and application of a Strickland v. Washington

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[12] The Brooks court decided that Strickland v. Washington, 104 S.Ct. 2052 (1984) provided the proper prejudice standard when deciding whether "fundamental fairness" under Donnelly v. (Footnote Continued)

prejudice standard is at odds with Caldwell: the court admitted in Brooks that "[a]lthough we cannot conclude that these few improper remarks had no prejudicial effect on the jury, we are satisfied that the prejudice was not severe." Brooks, 762 F.2d at 1415. If it cannot be said that there was "no prejudicial effect," the Eighth Amendment requires resentencing. Caldwell. This circuit decision conflicts with a decision in this Court. Rule 17.1 (c).

The conflict arose in this manner. On May 31, 1985, the Eleventh Circuit released its en banc decisions in Brooks, Drake, (W.B.) Tucker and (R) Tucker. Brooks was the lead case, and the Strickland prejudice test adopted controlled all four cases. This Court decided Caldwell 11 days later, recognizing that Eighth Amendment considerations prevent the state from creating an unacceptable risk that "'the death penalty may [have been] meted out arbitrarily or capriciously' or through 'whim or mistake.'" 105 S.Ct. at 2647 (O'Connor, J., concurring) (quoting California v. Ramos, 463 U.S. 992, 999 (1983). Petitions for rehearing were subsequently filed in (W.B.) Tucker and Brooks, and those petitions urged the en banc court to reconsider in light of Caldwell.

Rehearing was denied. However, three members of the en banc court dissented from denial of rehearing in both cases. In identical language in both dissents, the judges stressed that "[t]he majority's use of the Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed. 7d 674 (1984) prejudice test (which requires that the petitioner show that but for the improper argument the result of the proceeding would have been different)

(Footnote Continued)
DeChristoforo, 416 U.S. 637 (1974), requires reversal of a capital sentence possibly tainted by prosecutorial misconduct. Thus, a Petitioner under Donnelly/Strickland must prove that there is a reasonable probability that "but for those arguments, the death penalty would not have been given." Brooks, 762 F.2d at 1413. The Brooks standard was used to deny relief in Brooks, and the companion cases.

is in direct conflict with the recently decided Supreme Court case of Caldwell v. Mississippi." Brooks v. Kemp, ___ F.2d ___, No. 83-8028 (11th Circuit, July 23, 1985) (Clark, Kravitch, and Johnson, J.J., dissenting from denial of rehearing); (W.B.) Tucker v. Kemp, ___ F.2d ___, No. 83-8137 (11th Circuit July 23, 1985) (Clark, Kravitch, and Johnson, J.J., dissenting from denial of rehearing).

On August 6, 1985, the conflict grew. In Bowen v. Kemp, ___ F.2d ___, No. 84-8327 (11th Cir. 1985), a panel of the Eleventh Circuit again split on the Caldwell/Brooks issues. The two judge majority discussed a prosecutorial misconduct issue in pure Brooks/ Strickland language, without even acknowledging the existence of this Court's Caldwell decision. The dissent applied Caldwell: "Because the recent Supreme Court decision rejects the 'prejudice' test adopted in Brooks, I dissent. . . ." Bowen v. Kemp, No. 84-0327 (11th Cir. August 6, 1985) (Johnson, J., dissenting).

The Eleventh Circuit decided Mr. Darden's case July 23, 1985. The majority opinion addressed only the Witherspoon/Witt issue. The 1983 panel 2-1 decision, which did address the prosecutorial argument issue, is thus the Eleventh Circuit's only opinion on the prejudicial argument in Mr. Darden's case, and how prejudice is to be analyzed. 699 F.2d 1031. In light of the substantial judicial activity in this Court (Caldwell, Strickland) and in the Eleventh Circuit (Brooks) with regard to the proper prejudice standard, Petitioner requested rehearing on the closing argument issue, which was denied. Darden v. Wainwright, ___ F.2d ___, No. 81-5590 (11th Cir. August 27, 1985). In dissent, Judge Clark noted that "it would seem that the evidence here is weaker than in any of the four cases recently decided by the en banc court. The argument is as egregious as any." Id. Rehearing was required by Judge Clark "to clarify the discrepancy between the language of the en banc court in Brooks and that of the Supreme Court in Caldwell. Using

either [prejudice standard], however, Darden is entitled to relief."

The instant tension is between Caldwell and Brooks, but even before the Caldwell decision, the courts that addressed Petitioner's claim split over the issue of prejudice from the closing argument herein. It is apparent that the majority of the Eleventh Circuit judges do not believe that Caldwell provided an Eighth Amendment parameter to the Donnelly due process analysis. If the Eleventh Circuit is correct, certiorari is appropriate in this case to effect such a change in Donnelly now. If the Eleventh Circuit is incorrect, Petitioner is entitled to the benefits of Caldwell, and certiorari is the appropriate vehicle.

Either way, the problem of Caldwell's and Donnelly's scope will be a recurring one until resolved by this Court. Guidance is needed, and this case provides the proper vehicle. Rule 17.1 (c).

4. Respondent's Contentions Speak for Certiorari Rather than Against Certiorari, and Misrepresent the Record and this Court's Precedent.

Respondent admits that there is a "current struggle with the [closing argument] issue by the Eleventh Circuit Court of Appeals and the decision in Caldwell. . . ." Extraordinary Motion, p. 3. However, Respondent believes that the struggle is all for naught because Caldwell "is not a closing argument case; it is a capital sentencing case involving the Eighth Amendment." Id. (emphasis in original). Respondent continues: "Although the Eighth Amendment ramifications were established and developed by virtue of a statement made during a prosecutor's closing argument, the case has nothing to do with establishing any new standard of reviewing allegedly inflammatory and prejudicial remarks made during the guilt phase of a capital trial." Id.

These interesting propositions, if true, indicate that certiorari was providently granted. The State is insisting that outrageous arguments at guilt/innocence are insulated from Caldwell, even if sentencing deliberation occurs without any

significant interruption after the arguments, and even when all acknowledge that the guilt/innocence argument was the sentencing argument. If Caldwell is in fact "not a closing argument case" and has not modified Donnelly, this case is an appropriate case through which to remove the acknowledged "turmoil." Rule 17.1 (c). If Donnelly has been modified, Petitioner should receive its benefit. Id.

Respondent next incorrectly characterizes the effect of Maggio v. Williams, ___ U.S. ___, 104 S.Ct. 311 (1983) on the issues at hand. Respondent intimates that Williams was resolved against that Petitioner because there was not objection to the argument. That proposition is false. Williams was a successor petition, not a first writ case, and the Court rejected habeas relief on the closing argument claim because the failure to "raise this claim in his first federal habeas proceeding is inexcusable. . . ." 104 S.Ct. at 313.[13] Justice Stevens, concurring in Williams, also could not "find an adequate justification for petitioner's failure to raise this argument in his earlier federal habeas action." Id. at 316. Respondent literally underlines that counsel failed to object in Williams, but that was not the basis of this Court's decision. Respondent continues to argue that there was no objection in the case sub judice, and that relief should be denied, despite the flat out rejection of this posited basis for decision: the courts below have resolved the issue on the merits.

Finally, Respondent asserts that Petitioner has, at the last minute, switched from a fair trial guilt/innocence claim to an Eighth Amendment/sentencing claim, arguing that "remarks never held to be constitutionally improper somehow spilled over into the sentencing proceedings." (Extraordinary Motion, p. 5). This

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[13] The Court did note that the district court had determined that the argument was not reversible error, and gave the claim full consideration.

misrepresents the record. In the En Banc Brief of Amicus Curiae filed in the Eleventh Circuit in May, 1983, the issue of sentencing prejudice was clearly advanced: "the prosecution's misconduct cannot be said to have been without influence in this second stage of the proceedings." See Brief of Amicus Curiae, at 37. The sentencing issue had earlier been before the panel, as the dissent specifically stated that "because the prejudicial argument of counsel had an impact upon the jury which was not harmless beyond a reasonable doubt and did affect their deliberations with respect to the death penalty, I dissent." 699 F.2d at 1041. See also Petition for Rehearing and Rehearing en banc, p. 4, filed March 10, 1983; Initial Brief of Appellant to the Eleventh Circuit, p. 18, filed January 14, 1982; Brief of Petitioner to the District Court, filed November 7, 1979; Petition for Rehearing, filed with the En Banc court, filed August 23, 1985. This claim is not new; the controlling law is. Full briefing and argument is merited.

B. THE DECISION BELOW INCORRECTLY APPLIED WAINWRIGHT V. WITT, AND IS IN CONFLICT WITH WITHERSPOON V. ILLINOIS

The Court remanded this case for further consideration in light of Wainwright v. Witt, 105 S.Ct. 844 (1985). There was no indication in the remand that Witt required reversal of the Eleventh Circuit's 7-5 en banc decision in Darden v. Wainwright, 725 F.2d 1526 (11th Cir. 1984). The en banc court on remand conlcuded that "Witt controls the juror exclusion issue in this case. Under the Witt standards, Darden is not entitled to habeas corpus relief." Darden v. Wainwright, No. 81-5590 slip op. at 1 (July 23, 1985) (en banc). Either the en banc court misapplied Witt, or Witt completely overruled Witherspoon. In either event, this case is now a proper vehicle whereby the Court should clarify the Witt mandate. Rule 17.1 (c).

The Court reaffirmed Witherspoon in Witt, but narrowed the spectrum of challengeable jurors by dismissing as dictum footnotes 19 and 21 from Witherspoon, and denoting Adams v.

Texas, 448 U.S. 38 (1980) as the talisman in a Witherspoon challenge setting: "The standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" 105 S.Ct. at 852 (quoting Adams). "[T]he essential balance struck by the Witherspoon decision" was not overruled; it was adhered to. Id., n. 5. The test for exclusion was simply clarified.

Witherspoon and Witt acknowledge that there are people who have scruples against the death penalty who cannot be constitutionally excluded from capital jury service. The more adamantly someone is opposed to capital punishment, the more likely it is that that person's exclusion will be upheld; the less adamant one is in opposition, the more likely it is that their exclusion will be error. There exists a continuum or spectrum of potential jurors who oppose capital punishment, and some can be excluded from service.

The Eleventh Circuit decision says otherwise: persons opposed to capital punishment cannot serve on capital juries. There is no latitude. Juror Murphy was excluded from juror service upon the following:

> Do you have any moral . . . religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?
>
> Mr. Murphy: Yes, I have.

No other questions were asked. It was not established that Juror Murphy would not perform his duties, or that it would even be difficult for him to do so. It was only established that he opposed capital punishment, and it would violate his principles to vote for it.

The en banc court thus believed that Witt required excusal for all opponents of capital punishment, a pre-Witherspoon rule. No finding that the principles would "prevent or substantially impair the performance of his duties" is necessary, in complete

derogation of Witt. Opposition to capital punishment terminates jury service, as the en banc court's decision is explained and defended by Respondent:

> Does not the doing of an act which violates very strong moral, religious, or conscientious principles perfectly represent the "prevention or impairment" of a juror's duties in accordance with his instructions or oath? Though rhetorically posed, the answer to this question is unqualified "yes."

(Extraordinary Motion, p. 6). Respondent's position reveals precisely why certiorari was not improvidently granted.

If a principle against capital punishment automatically means substantial impairment of the ability to perform a juror's duties, Witherspoon has been overruled. Certiorari review here is then proper for the Court to inform the courts that Witherspoon is no longer law, and its "essential balance" is now completely weighted by jurors "uncommonly willing to condemn a man to die." Witherspoon, 391 U.S. 510 at 512. If Witt means that opponents of capital punishment can serve, if their principles will not substantially impair the performance of their duties, certiorari was providently granted to explicate Witt, and afford Petitioner relief. Rule 17.1 (c).

C. PETITIONER'S COUNSEL CONDUCTED NO INDEPENDENT INVESTIGATION FOR SENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

This claim presents a clear-cut question for resolution by the Court: when counsel conducts no investigation to discover and produce non-statutory evidence in mitigation, and the failure to investigate is caused by reliance on a capital sentencing statute which limits evidence in mitigation to certain statutorally defined mitigating circumstances, is Petitioner denied effective assistance of counsel under the Sixth Amendment, and/or a reliable and individualized capital sentencing determination under the Eighth Amendment? This case is a proper vehicle for resolution of this fundamental capital sentencing issue. Rule 17.1 (c).

The defense attorneys in this case candidly and openly admitted at the habeas hearing in 1979 that they considered themselves limited in the types of evidence that could be introduced at sentencing in 1974.[14] The testimony below was

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[14] Respondent completely ducks this issue, and takes Petitioner to task for predicating this claim on "completely false information," with which Petitioner "has attempted to continuously mislead the courts." Extraordinary Motion, pp.6-7. Respondent states that it is time to "set the record straight."

Petitioner alleged in his petition that he was represented by Mr. Maloney and Mr. Goodwill at trial and at sentencing. The record amply reflects this. (Question of Mr. Maloney: "And you were co-counsel then with . . . Goodwill?" Answer: "Yes, sir." (H.C. 140)). Respondent contends that "Mr. Maloney was nothing more than a legal intern with the Public Defenders' office in 1974 and was assigned to assist Mr. Goodwill." Extraordinary Motion, p.6. While Mr. Maloney was indeed merely an intern early on in the case, Respondent knows, since Respondent cross-examined Mr. Maloney, that that role changed -- Mr. Maloney was an attorney in 1974, not an intern:

> Q. At the beginning of the incident involving Mr. Darden, you were but a legal intern working for the Public Defenders' office?
> A. Yes, sir.
> Q. And I believe you stated that your primary, if not your sole duty, was to assist trial lawyers.
> A. Yes, sir.
> Q. Would it be fair to say that that assistance was in whatever form necessary?
> A. Yes, sir.
> Q. After you passed the bar and became involved in the Darden case on a basis other than as an intern, would you please again describe precisely your involvement in this case and your familiarity with the case--with regard to Mr. Goodwill.
> A. I was the research assistant, so that I was in charge of doing legal research on any motion that had to be done.
>
> I was also, I suppose, not in charge, but it was my duty to complete and familiarize myself with the discovery and completely familiarize myself with potential defense witnesses.
>
> I was assigned the responsibility of preparing and arguing the motion to strike in-court identification.
> Q. Did you familiarize yourself with all discovery, all witnesses, and with all aspects of the case?
> A. Yes, sir.
> Q. Would it be fair to say that you knew about as much -- did you know as much about the case as did Mr. Goodwill?
> A. Yes.

(H.C. 162-63). This was Respondent's cross-examination, the same Respondent who contends that Mr. Maloney was an "intern" during trial. (Footnote Continued)

unequivocal: in preparation for sentencing, the attorneys decided to offer no evidence in mitigation -- "that decision was made after a perusal of the mitigating circumstances in the Florida Statute 921.141. And we reached the conclusion that Mr. Darden did not qualify for any of the mitigating circumstances." (H.C. 154). Mr. Maloney (County Court Judge Maloney, at the time of this hearing), further explained the "perusal":

> We were operating on the premise at that time we were limited to those mitigating circumstances. At least I was completely unaware that any mitigating circumstance, if relevant, is admissable.
>
> Something should have been offered in mitigation. In any captial case such as this, something can be offered in mitigation.
>
> Q. Would it be fair to say that you and co-counsel were using 921.141-- I believe its subsection b, mitigating circumstances-- as being a closed shop? That was all you could consider in way of mitigating circumstances and nothing outside the four corners of the statute?
>
> A. Until the Supreme Court ruled in Gardner v. Florida, that was my opinion. And Gardner v. Florida considerably post-dated this trial.
>
> Q. Okay. But that was what you were all thinking on that day--
>
> A. Yes, sir.
>
> Q. -- on January 19th, 1974.
>
> A. Yes, sir.

(Footnote Continued)

This "intern" or "helper" conducted most of the voir dire (R. 104, 107, 116-52, 159, 160-76, 179-82), cross-examined the victim's widow out of the presence of the jury to support his argument that an identification should be stricken (R. 214-24), cross-examined five other witnesses (R. 296-304, 3318-29, 333-42, 407-08, 417-22), and conducted the first closing argument for the defense (R. 716-38). He did all this as a "helper," and "[p]rior to trial was never informed that [he] would do any actual work before the jury." (H.C. 145). He did not know he was to conduct voir dire until the day of trial (H.C. 145-47), he did not know that he was to cross-examine a witness until the witness was on the stand (H.C. 148), and he was left completely alone to deal with the case when "lead" counsel Goodwill was too drunk/hung-over to attend. (h.C. 159).

From this activity, Petitioner could reasonably describe Mr. Maloney as being at least one of his attorneys at trial.

. . .

> A. We certainly went through the mitigating circumstances in 921.141, and I believe we came to the conclusion that there were no mitigating circumstances and no evidence was presented.

(H.C. 154-55). Maloney learned he was wrong after Lockett: "Lockett is the first time that I found out from the United States Supreme Court that mitigating circumstances were not limited to the enumerated mitigating circumstances." (H.C. 178).

Co-counsel Mr. Goodwill felt similarly limited (H.C. 337),[15] as did the chief public defender, who testified below, but who did not participate at trial. The following colloquoy occurred between the Magistrate below and the chief public defender:

> Q. And in connection with the penalty phase, was Mr. Darden consulted or advised or prepared for his testimony at the penalty phase?
>
> A. I think he was, your honor.
>
> Q. To your knowledge, was he or wasn't he?
>
> A. Yes, because we had discussed it. We had taken the statute and gone down its specific grounds for mitigating circumstances, and we could find no grounds, as you know what the six were.

(H.C. 245-46).

Consequently,

> In the sentencing portion of the trial, there were practically no mitigating circumstances brought forth at all. Mr. Darden was allowed to testify and did testify, did speak to the jury, made his own presentation to the jury.

Respondent contends that since Mr. Goodwill knew of no non-statutory mitigating evidence, and Mr. Goodwill told Petitioner

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[15] In the haste brought about by the rush of execution, counsel for Petitioner did commit scrivenor's errors, for which he apologizes. He referred to co-counsel as "McDonald" and "McDaniel" and said that Goodwill had never tried a capital case. Petitioner intended to indicate that Mr. Goodwill had tried no capital cases post-Furman, but erred.

The error does not affect the validity of the claim: Mr. Goodwill may have tried thousands of cases pre-Furman, but he still felt bound by the statute, and "investigated" accordingly: not at all.

"he could take the stand an tell the jury anything at all in mitigation," there was no constitutional violation, despite the lack of investigation. (Extraordinary Motion, p. 7). Goodwill knew of no evidence because he did no investigation. Allowing a defendant to testify to mitigation does not provide him with the opportunity to proffer any aspect of his background which may be mitigating. It merely forces a client to sacrifice his fifth amendment right in order to partially effect his Eighth Amendment rights. Even upon such an election to testify, the defendant's testimony is no substitute for the myriad mitigating circumstances which an investigation would reveal.

The Court has recognized that the capital sentencing scheme in effect in Florida in 1974 apparently restricted the introduction of non-statutory mitigating circumstances. Spaziano v. Florida, 468 U.S. ___, 104 S.Ct. 3154, 82 L.Ed.2d 340, 347n.4 (1984). See also Barclay v. Florida, 467 U.S. ___, 103 S.Ct. 3418, 3430n.2 (1983) (Stevens, J., concurring). Trial counsel here was under such an impression. The issue for resolution is whether this restriction on or by counsel is of constutional moment.

It is clear that there can be no restriction, either expressly by statute, Lockett v. Ohio, 438 U.S. 586 (1978), or as applied in a particular case, Eddings v. Oklahoma, 455 U.S. 104 (1982), upon the consideration of mitigating factors by judge or jury. The Eighth Amendment requires individualized sentencing, Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 2743-44 (1983), and restriction on mitigation "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 U.S. at 605. Proceedings must "remove any legitimate basis for finding ambiguity concerning the [mitigating] factors actually considered. . . ." Eddings, 455 U.S. at 119 (O'Connor, J., concurring), "[i]n order to ensure that the death penalty was not erroneously imposed. . .

." Id. at 119.

Petitioner's ineffective assistance of counsel claim is this: counsel did not prepare for sentencing, and as a result Petitioner was denied meaningful individualized consideration. Whether this was through counsel's neglect, Strickland v. Washington, 104 S.Ct. 2052 (1984), or because the State, through its statute, prevented such preparation, United States v. Cronic, 104 S.Ct. 2039 (1984), a reversal of Petitioner's sentence is required.

"[I]f counsel entirely fails to subject the prosecutor's cas to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." Cronic, 104 S.Ct. at 2047. Almost sleeping counsel is no counsel at all. There was no adversarial sentencing hearing. There was no hearing at all, because counsel believed the sentencing statute did not allow one.

Similarly, if counsel's failings are assignable to the State, no prejudice need by shown. When the surrounding circumstances "make it so unlikely that any lawyer could provide effective assistance," then ineffectiveness is "presumed without inquiry into actual performance at trial." Id. at 2048. A statute that a lawyer reasonably believes to restrict mitigation, in an Eighth Amendment setting, produces surrounding circumstances making it impossible to perform as an advocate: advocacy requires investigating and producing mitigating circumstances, and the statute prevented it.

This case provides an opportunity to determine whether it is in fact ineffective per se for trial counsel in a capital case to not investigate to discover mitigating circumstances. If the statute makes an attorney's decision to forego investigation "reasonable," a pure Eighth Amendment violation arises, and no prejudice need by shown. The Eleventh Circuit en banc decisions in Songer v. Wainwright, No. 83-3064 (August 16, 1985) and Hitchcock v. Wainwright, No. 83-3578 (August 28, 1985), highlight

the legitimacy of this claim. In Songer, the trial judge, "misinterpreted" the Florida statute "as limiting consideration of mitigating evidence to those "enumerated items." Songer, slip op. at 2. The en banc majority recognized that the statute could be so construed, and that the trial judge there did so misinterpret the law. The court held that a resentencing hearing was necessary, but left it to the state court to decide whether the resentencing required a jury. Four Judges joined in an opinion concurring in part and dissenting in part. They believed that Florida law produced "counsel's failure to develop or present non-statutory mitigating evidence," and because "state law operated to restrict consideration of evidence by both the sentencing judge and the advisory jury," the jury should be allowed to perform its critical role at resentencing. Songer, opinion of Clark, J., concurring in part and dissenting in part, in which Kravitch, Johnson, and Anderson, J.J., joined.

Hitchcock likewise recognized the confusing status of Florida law at the time of Petitioner's trial, and proposed a framework for resolution of Sixth and Eighth Amendment claims arising from the statute's effects. Petitioner believes that full briefing and argument in this Court can and should properly resolve these issues, of great import to the proper administration of capital sentencing.

CONCLUSION

For the reasons stated above, Respondent's Extraordinary Motion to Dissolve Stay of Execution and Suggestion That Writ Was Improvidently Granted should be denied.

Respectfully submitted,

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904-224-5900

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Richard W. Prospect, Assistant Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida, 32014, on this 07 day of ~~September~~ October, 1985.

ATTORNEY